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## Forum over Substance: Cornelius v. NAACP Legal Defense & Education Fund

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## FORUM OVER SUBSTANCE: *CORNELIUS v. NAACP LEGAL DEFENSE & EDUCATION FUND*

Money may be the root of all evil, but it can also be the source of a great deal of good when given to charity.<sup>1</sup> Thousands of organizations rely on charitable contributions to fund their daily activities. The importance of donations to these groups' work is reflected in the tax code<sup>2</sup> and in the federal government's sponsorship of the Combined Federal Campaign (CFC).<sup>3</sup> The CFC is a means of encouraging federal employees to give to charity,<sup>4</sup> while limiting the disturbance in the federal workplace that solicitation by a number of charities might cause.<sup>5</sup> In pursuit of these goals, the federal government has issued regulations which, among other things, limit participation in the CFC to reputable charitable groups.<sup>6</sup>

Those standards, as amended by President Reagan through executive orders,<sup>7</sup> would exclude several legal defense funds (LDFs) from the CFC. Those organizations' legal challenge to enforcement of the regulations eventually led to the United States Supreme Court's decision in *Cornelius v. NAACP Legal Defense & Education Fund*.<sup>8</sup> There, the Court held that although the LDFs' solicitation of contributions is speech protected by the first amendment,<sup>9</sup> the government's justifications for excluding those organi-

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1. Luke 21:1-4.

2. See 26 U.S.C. § 501(c)(3) (1982 & Supp. 1983).

3. See 5 C.F.R. § 950.105 (1984).

4. 5 C.F.R. § 950.103 (1984).

5. Exec. Order No. 10,728, 3 C.F.R. 387 (1954-1958 Comp.). See *Cornelius v. NAACP Legal Defense & Educ. Fund*, 105 S. Ct. 3439 (1985). There, the Supreme Court noted that prior to the establishment of the CFC, solicitation caused disruption in the federal workplace:

Because no systemwide regulations were in place to provide for orderly procedure, fund-raising frequently consisted of passing an empty coffee can from employee to employee. Eventually, the increasing number of entities seeking access to federal buildings and the multiplicity of appeals disrupted the work environment and confused employees who were unfamiliar with the groups seeking contributions.

*Id.* at 3444 (citations omitted). See also *Hearing before the House Comm. on Government Operations*, 98th Cong., 1st Sess., 67-68 (1983).

6. 5 C.F.R. § 950.103(a) (1984). See generally 5 C.F.R. §§ 950.101-.525 (1984).

7. Exec. Order No. 12,353, 3 C.F.R. 139 (1983); Exec. Order No. 12,404, 3 C.F.R. 151 (1984).

8. 105 S. Ct. 3439 (1985).

9. *Id.* at 3447. Here the Court followed *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), where a city ordinance restricting solicitation of contributions to organizations which used 75% of their receipts for charitable purposes was struck

zations from the campaign were reasonable.<sup>10</sup> In so holding, the Court engaged in "forum analysis," a device used to evaluate the constitutionality of regulating expressive activity on government property<sup>11</sup> by balancing the mandates of the first amendment<sup>12</sup> against the government's power to restrict the use of its property to its intended purpose.<sup>13</sup> Under forum analysis, the government's power to regulate speech depends largely on the degree to which that speech would interfere with the use the government intends for the forum property<sup>14</sup> and the public or nonpublic nature of the property.<sup>15</sup>

This Note will review the Court's earlier decisions that evaluated the constitutionality of a governmental entity's efforts to restrict access or regulate speech on property an individual sought to use as a first amendment forum. Further analysis will focus upon the Court's opinion in *Cornelius* in light of those cases. Finally, this Note will conclude that in applying forum analysis in *Cornelius*, the Court has given the government almost limitless discretion in applying restrictions on speech in facilities not generally open to the public. It has done so by categorizing the forum property by the extent to which the government had intended to allow access to it. Because the category imposed dictates the standard of review, and thus, to a great degree, the result, the Court effectually has predicated the right to expression on government property on the government's willingness to allow expression there,

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down as overbroad. There, after an extensive review of its prior decisions regarding religious and charitable solicitations, the Court recognized that:

Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.

*Id.* at 632. The 75% limitation was found not to promote adequately a government interest which was sufficiently important to override the free speech interests involved and was therefore invalid. *Id.* at 636.

10. *Cornelius*, 105 S. Ct. at 3447.

11. See Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287 (1979).

12. The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

13. As the Court stated in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983), "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." See *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129-30 (1981); *Greer v. Spock*, 424 U.S. 828, 836 (1976); *Adderley v. Florida*, 385 U.S. 39, 48 (1966).

14. See *Perry*, 460 U.S. at 45-46.

15. *Id.*

without considering how a particular expressive activity would affect the dedicated use of that property.

# I. FORUM ANALYSIS: A PLACE FOR EVERYTHING, AND EVERYTHING IN ITS PLACE

Forum analysis crystallized in the Supreme Court's 1983 decision in *Perry Education Association v. Perry Local Educators' Association*.<sup>16</sup> There, the Court held that the characteristics of a public property may justify restrictions on an individual's right of access to that property and that evaluation of such restrictions varies with the nature of the property.<sup>17</sup> The Court explained this relationship by describing three categories of fora for expression: the traditional public forum, the limited public forum, and the nonpublic forum.<sup>18</sup>

The first of these, traditional public fora, are those places that traditionally have been sites for expressive activity.<sup>19</sup> The government may exclude speakers from these places because of the content of the speech only when the regulation is carefully designed to restrict speech no more than necessary to serve a compelling state interest.<sup>20</sup> The government may regulate the time, place, and manner of speech in these places, but only so far as is necessary to serve a significant government interest.<sup>21</sup>

The second category of fora, the limited public forum, differs from the traditional public forum in that it has been created by the government by

16. *Id.*

17. *See id.* at 44, where the Court observed, "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue."

18. *Id.* at 45-46.

19. *Id.* at 45. These are "places which by long tradition or by government fiat have been devoted to assembly and debate . . . ." *Id.*

20. *Id.* The Court held that in these places, "[f]or the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)).

Regardless of the forum, the government may punish a speaker for the *content* of speech, if the speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

21. *Perry*, 460 U.S. at 45. The Court held that in these fora, "[t]he State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.* (citations omitted).

The significant government interests that may justify these regulations include: "to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder." *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).

opening property to the public for expressive activity<sup>22</sup> for a limited time<sup>23</sup> or for a limited purpose.<sup>24</sup> As long as the government retains the open character of the property, the same standards regarding permissible regulations of speech as are applied in a traditional public forum must apply. Reasonable time, place, and manner regulations may also be imposed.<sup>25</sup>

Different standards of permissible regulation apply to the third category, the nonpublic fora. These are areas that have not been designated for, or traditionally used as, a forum for public expression.<sup>26</sup> The government may regulate speech in these places as it may in other fora, but it may also make distinctions between speakers that would not be allowed in other fora, as long as those distinctions are designed to limit activities to those that are compatible with the forum's intended purpose.<sup>27</sup> Reasonable distinctions may be made based upon the speaker's status and the subject matter about which he intends to speak,<sup>28</sup> provided the distinctions are consistent with the designated purpose of the forum property and are not made to exclude unpopular views.<sup>29</sup>

*Perry* distinguishes the various fora on the basis of the government's action in allowing or limiting access to particular property, a distinction which is valuable as a broad outline of forum analysis. This distinction is misleading, however, if used as a method of analysis rather than a summary of that analysis, as it implies that the government may restrict expression in some places simply because it intends to restrict expression in those places.<sup>30</sup> A closer look reveals that in the past, the Court has evaluated restrictions on expressive use of government property by looking at the particular expres-

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22. *Perry*, 460 U.S. at 45.

23. The government "is not required to indefinitely retain the open character of the facility . . . ." *Id.* at 46.

24. Use may be limited to certain groups or to discussion of particular subjects. *Id.* at 46 n.7.

25. *Id.* at 46.

26. *Id.*

27. *Id.* at 49. The Court observed:

These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

*Id.*

28. The Court held that "[i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. *Id.*

29. The Court found that "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 46.

30. See *United States v. Grace*, 461 U.S. 171, 180 (1983). There, the Court noted that "Congress . . . may not by its own ipse dixit destroy the 'public forum' status of streets and

sive activity, by examining the way the particular property is normally used, and by evaluating the effect of that expression on that use.<sup>31</sup> While the facts of each case undoubtedly complicate this evaluation, the underlying principle remains quite simple: restrictions on expression are constitutionally permissible only to the extent that such restrictions require compatibility with the normal use of the property.<sup>32</sup>

#### A. *Traditional Fora: Streets and Parks*

Before the turn of the century, the Supreme Court did not adhere to the compatibility principle but allowed the government to use its power as a property owner largely without restriction. In *Davis v. Massachusetts*,<sup>33</sup> the Boston Common was found to be absolutely under the State's control when a speaker appealed his conviction for violating an ordinance requiring a permit from the mayor prior to making a speech.<sup>34</sup> There, the Court found that because the Common was entrusted to the control of the city by the state, and the state's power to control the use of its property was equal to that of a private citizen, the city could regulate its use as it pleased.<sup>35</sup>

That holding was largely ignored forty-two years later in *Hague v. CIO*,<sup>36</sup> where the Court held that the public officials of Jersey City, New Jersey,

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parks which have historically been public forums . . . ." (quoting *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 133, (1981)).

Justice Blackmun voiced this same complaint in dissent in *Cornelius*. See *infra* notes 185-86 and accompanying text.

31. See *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (discussed *infra* notes 85-91 and accompanying text), where the Court held that "consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Id.* at 650-51.

32. See *Grayned v. City of Rockford*, 408 U.S. 104 (1972). There, the Court observed that "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Id.* at 116. See also *Brown v. Louisiana*, 383 U.S. 131, 151 (1966) (White, J., concurring).

33. 167 U.S. 43 (1897).

34. The ordinance read:

No person shall, in or upon any of the public grounds, make any public address, discharge any cannon or firearm, expose for sale any goods, wares or merchandise, erect or maintain any booth, stand, tent or apparatus for the purposes of public amusement or show, except in accordance with a permit for the mayor.

*Id.* at 44.

35. The Court held that "[f]or the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." *Id.* at 47. Consequently, the Court concluded that Davis had no right "to use the common except in such mode and subject to such regulations as the legislature in its wisdom may have deemed proper to prescribe." *Id.*

36. 307 U.S. 496 (1939).

could not flatly deny members of the Committee for Industrial Organization the right to speak and distribute literature in the streets and parks.<sup>37</sup> There the Court found that regardless of ownership, the streets and parks have traditionally been used by the public for expressive purposes.<sup>38</sup> The ordinance under which the city officials had acted was found to be unconstitutional because its scope was not limited to preserving the normal use of the streets and parks.<sup>39</sup> Rather, the ordinance allowed city officials to refuse a permit at their discretion, thus permitting them to suppress expression.<sup>40</sup>

Two years later, in *Cox v. New Hampshire*,<sup>41</sup> the Court upheld the conviction of several Jehovah's Witnesses for parading without a license through the streets of Manchester, New Hampshire, thus interfering with normal sidewalk travel.<sup>42</sup> The marchers had not applied for a permit, although they knew one was required.<sup>43</sup> The Court found the licensing ordinance, as construed by the New Hampshire Supreme Court,<sup>44</sup> to be constitutional, because it did not vest absolute discretion in the city officials, as in *Hague*, but required their efforts to maintain orderly public use of the streets to be systematic and just.<sup>45</sup> The Court found the licensing ordinance to be a permis-

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37. The CIO also alleged that Jersey City police had made unlawful searches for, and seizures of, printed matter; had violently interfered with distribution of literature; and had forced C.I.O. members "to board ferry boats destined for New York." *Id.* at 501-02.

38. The Court observed that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* at 515.

39. *Id.* at 516. See *Niemotko v. Maryland*, 340 U.S. 268 (1951) (arbitrary refusal of permit to use public park is unconstitutional); *Kunz v. New York*, 340 U.S. 290 (1951) (officials cannot restrain speech without guidance by appropriate standards, even in a case where the speaker would likely be restrained by such standards).

40. *Hague*, 307 U.S. at 516. A state law flatly prohibiting picketing was held invalid in *Thornhill v. Alabama*, 310 U.S. 88 (1940), as overly broad. In that case, the picketing was conducted on private property. Cf. *Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968) (labor union pickets could not be barred entirely from shopping mall generally open to the public). But see *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (limited *Logan Valley* holding to picketing relating directly to the use of the shopping center and where no feasible alternative was available).

41. 312 U.S. 569 (1941).

42. *Id.* at 573.

43. *Id.*

44. *State v. Cox*, 91 N.H. 137, 16 A.2d 508 (1940). By relying on the State Supreme Court's interpretation, rather than on the statute as written, the Court gave the state, in effect, a second chance at writing a permissibly narrow statute. But see *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), which limited the extent to which a state supreme court could revise and narrow a statute through interpretation.

45. The Court found "that a 'systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate.'" *Cox*, 312 U.S. 569, 576 (1941) (quoting *State v. Cox*, 91 N.H. 137, 143, 16 A.2d 508, 513 (1940)).

sible extension of the city's authority to control the use of the streets because it promoted the legitimate public goal<sup>46</sup> of ensuring the convenience of all users.<sup>47</sup> The license requirement was found to be important in that effort because it gave the authorities prior notice so that they could prepare for the problems that such a march might present.<sup>48</sup> Additionally, the Court found that except for the lack of a license, the parade would have been entirely permissible under the statute.<sup>49</sup>

Once again, in *Edwards v. South Carolina*,<sup>50</sup> the Court evaluated a group's right to parade and assemble. *Edwards* involved civil rights marchers who had not violated statutory restrictions on use of the state capitol grounds, but who were nonetheless ordered to disperse by the police.<sup>51</sup> When the marchers refused and instead engaged in "'boisterous,' 'loud' and 'flamboyant' conduct,"<sup>52</sup> they were arrested and convicted for breach of the peace.

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46. The Court reiterated:

The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order on which they ultimately depend.

*Cox*, 312 U.S. at 574.

47. *Id.* at 576.

48. *Id.* A license fee which could range up to \$300 was also upheld as long as the fee was used only to defray the costs of the parade to the city. *Id.* at 577. Such a fee was later challenged in *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1978), where an ordinance requiring parade organizers to obtain at least \$300,000 in liability insurance and \$50,000 in property damage insurance prior to a march was found unconstitutional. The court found that the requirement all but precluded public assemblies due to its prohibitive cost; that the requirement was not shown to be necessary; and that some exemptions may have been granted, but that an absence of standards for exemption allowed the city too much discretion. Such discretion might be used to allow only those demonstrations the message of which the city authorities approved. *Id.* at 684-86. The city conceded the unconstitutionality of the ordinance, as applied to the proposed demonstration, on appeal. That limited concession was accepted by the Court of Appeals, which ruled no further on the issue. *Collin v. Smith*, 578 F.2d 1197, 1207-08 (7th Cir. 1978).

49. The Court found:

. . . The [marchers] "had a right, under the Act, to a license to march when, where and as they did, if after a required investigation it was found that the convenience of the public in the use of the street would not thereby be unduly disturbed, upon such conditions or changes in time, place and manner as would avoid disturbance."

*Cox*, 312 U.S. at 576 (quoting *State v. Cox*, 91 N.H. at 146, 16 A.2d at 515).

50. 372 U.S. 229 (1963).

51. *Id.* at 236 & n.11.

52. Such conduct included singing the "Star Spangled Banner." *Id.* at 233. Fourteen years earlier, the Court upheld a ban on loud and raucous *amplified* broadcasts on the streets of Trenton, New Jersey, in *Kovacs v. Cooper*, 336 U.S. 77 (1949), finding "that the need for reasonable protection in the homes or business houses from the distracting noises of vehicles equipped with such sound amplifying devices justifies the ordinance." *Id.* at 89.

A considerably quieter mode of expression was prohibited by National Park Service regulations in *Clark v. Community for Creative Non-violence*, 104 S. Ct. 3065 (1984). Members of



The Court held that the statute under which the protestors were convicted was so broad as to have no bearing upon the control of the proper use of the state capitol grounds or of the maintenance of order or public safety.<sup>53</sup> The demonstrators were in fact arrested because of the unpopularity of their message.<sup>54</sup>

A similar breach of the peace conviction was dismissed in *Cox v. Louisiana*,<sup>55</sup> where protestors had gathered across the street from the courthouse in Baton Rouge, Louisiana, and had engaged in activity even more boisterous than had the defendants in *Edwards*.<sup>56</sup> The Court dismissed the breach of the peace conviction for the same reasons articulated in *Edwards*<sup>57</sup> and also dismissed a conviction for obstructing public passages.<sup>58</sup> A conviction

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CCNV wanted to sleep in symbolic tents in Lafayette Park, across the street from the White House in Washington, D.C., to demonstrate the condition of the homeless but could not because of Park Service restrictions on camping in that area. The Court assumed the sleeping portion of the demonstration was expressive conduct, *id.* at 3070, but found that the regulation prohibiting that expression adequately served "the Government's substantial interest in maintaining the parks in the heart of our capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence," to justify the restriction. *Id.* at 3071.

53. *Edwards*, 372 U.S. at 236-37. The South Carolina Supreme Court had held that the term breach of the peace, "is not susceptible of exact definition." *Id.* at 234. See *State v. Edwards*, 239 S.C. 339, 343-44, 123 S.E.2d at 249 (1961); see also *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). There the Court found a vagrancy statute "void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' . . . and because it encourages arbitrary and erratic arrests and convictions." *Id.* at 162 (citations omitted). See also *NAACP v. Button*, 371 U.S. 415 (1963). There the Court found that a statute implicating first amendment rights may be unconstitutionally overbroad, allowing for improper unconstitutional applications. The Court noted that for that reason, "in appraising a statute's inhibitory effect upon [first amendment] rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts beside that at bar." *Id.* at 432.

54. The Court found that "they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection." *Edwards*, 372 U.S. at 236-37.

55. 379 U.S. 536 (1965).

56. The trial court noted:

[I]t must be recognized to be inherently dangerous and a breach of the peace to bring 1,500 people, colored people, down in the predominantly white business district in the City of Baton Rouge and congregate across the street from the courthouse and sing songs . . . carrying lines such as "black and white together" and to urge those 1,500 people to descend upon our lunch counters and sit there until they are served.

*Id.* at 549-50.

57. *Id.* at 552.

58. That conviction was overturned not because of the relevant statute, which prohibited all assemblies or parades in the streets, but because the authorities had not applied the statute evenhandedly, but had allowed or prohibited assemblies or parades at their discretion. *Id.* at 556, 557.

for picketing near a courthouse, based on the same facts, presented different constitutional problems, requiring a separate opinion.<sup>59</sup>

In that opinion, Justice Goldberg explained that prohibitions on picketing near courthouses were designed to protect the judicial system, including judges, jurors and court employees, from undue pressures<sup>60</sup> and to exclude mob influence from the judicial process.<sup>61</sup> The narrowly drawn Louisiana statute prohibiting such picketing was held valid on its face, because it regulated conduct in order to further important societal interests.<sup>62</sup>

The courthouse picketing issue presented in *Cox v. Louisiana* was brought again, literally, to the Supreme Court in *United States v. Grace*.<sup>63</sup> In that case, two demonstrators brought suit challenging enforcement of a federal law that prohibited the use of banners, flags, and the like in demonstrations on the grounds of the Supreme Court building.<sup>64</sup> While on the sidewalk in front of the building, one protestor had handed out leaflets and another had displayed a sign bearing the text of the first amendment. The Court avoided the question of permissible regulation of speech in the building and on the grounds of the Supreme Court and addressed only the question of regulation of speech on the sidewalk adjacent to the grounds.<sup>65</sup> The Court found no justification for regulating the use of those sidewalks any differently from other city sidewalks.<sup>66</sup> The statutory restrictions on speech on those sidewalks were held unconstitutional because they did not sufficiently promote the public interest in the preservation of their normal use.<sup>67</sup>

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59. *Cox v. Louisiana*, 379 U.S. 559 (1965).

60. *Id.* at 561-64.

61. *Id.* at 562.

62. *Id.* at 564. The Baton Rouge authorities, however, once again had problems enforcing a statute. The conviction was overturned on due process grounds because the authorities had given Cox permission to hold the demonstration on the far side of the street across from the courthouse and then sought to convict him for demonstrating in that same area. The Court admonished that "[t]he Due Process Clause does not permit convictions to be obtained under such circumstances." *Id.* at 571.

63. 461 U.S. 171 (1983).

64. The statute provided: "It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." 40 U.S.C.A. § 13k (West 1969).

65. 461 U.S. at 178-79.

66. The Court found that "[t]he sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated any differently." *Id.* at 179.

67. *Id.* at 181-82. See *Cameron v. Johnson*, 390 U.S. 611 (1968), where the Court upheld a statute which prohibited the "obstruction of or unreasonable interference with ingress and egress to and from public buildings, including courthouses, and with traffic on the streets or sidewalks adjacent to those buildings," *id.* at 622, as applied against demonstrators who had

### B. Nontraditional Sites For Expression

The importance of content neutrality in regulations of speech in a public forum should not be underestimated. It was a major concern in Supreme Court decisions striking down statutes that gave government authorities undue discretion over who may parade or speak. For example, in *Chicago Police Department v. Mosley*,<sup>68</sup> the Court, on equal protection grounds, invalidated an ordinance that allowed peaceful picketing of school grounds by labor groups, but not by others, because it allowed or disallowed picketing depending on its subject matter.<sup>69</sup> Since the distinction between labor and nonlabor picketing was found to be of no use in preventing disruption in the schools, the ordinance making that distinction was disallowed.<sup>70</sup>

On the same day that it struck down the school picketing ordinance in *Mosley*, the Court upheld a school antinoise ordinance in *Grayned v. City of Rockford*.<sup>71</sup> For his part in a demonstration outside a high school, Grayned was convicted under an ordinance prohibiting willfully making noise that would disrupt a school while that school was in session. While the ordinance prohibited the same sort of activity protected in *Edwards*, the court explained that here, the prohibited activity was basically incompatible with the normal use of the property at that time of day.<sup>72</sup> Other forms of expression which would not disrupt the school, such as peaceful picketing or handbilling, would be allowed under the ordinance.<sup>73</sup>

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maintained a picket line for two and one half months before the legislature passed the act. *Id.* at 614.

68. 408 U.S. 92 (1972).

69. The Court observed that "above all else, the first amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95.

See *Madison School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976). There, the Court held that the commission could not restrain speech by a teacher at a school board meeting open to the public, merely because he spoke on the teachers' pending collective bargaining agreement but was not an authorized union representative, observing that "[w]here the State has opened a forum for direct citizen involvement, it is difficult to find justification for excluding teachers who make up the overwhelming proportion of school employees and who are most vitally concerned with the proceedings." *Id.* at 175.

70. *Mosley*, 408 U.S. at 100-02. Similarly, in *Carey v. Brown*, 447 U.S. 455 (1980), the Court struck down a residential picketing statute for the same reasons as in *Mosley*, finding that "under the guise of preserving residential privacy, Illinois has flatly prohibited all nonlabor picketing even though it permits labor picketing that is equally likely to intrude on the tranquility of the home." *Id.* at 462.

71. 408 U.S. 104 (1972). At the same time, a Rockford ordinance that allowed labor picketing, but not other picketing on school grounds, much like the Chicago ordinance in *Mosley*, was struck down for the reasons articulated in *Mosley*. *Id.* at 107.

72. *Id.* at 116.

73. *Id.* at 119.

*Tinker v. Des Moines School District*,<sup>74</sup> concerned the suspension of high school students for wearing black armbands to protest the war in Vietnam. The Court found that the school authorities had punished the students even though their form of expression did not itself disrupt the school.<sup>75</sup> The Court held that while activity which disrupts the classroom or invades the rights of others would not be protected under the first amendment,<sup>76</sup> these students' nondisruptive activities could not be banned merely because the school officials might wish to avoid controversy.<sup>77</sup> Thus, the Court suggested that even in places that are not traditional public fora for expressive activity, the only permissible restrictions on expression are those that require the expressive activity to conform to the normal use of the place.

This principle was demonstrated in *Brown v. Louisiana*.<sup>78</sup> In that case, Brown and four other men had been arrested for silently standing or sitting in the reading room of the public library in Clinton, Louisiana. "They were neither loud, boisterous, obstreperous, indecorous nor impolite,"<sup>79</sup> but they were black, and the library had been reserved for the use of white citizens. The Court's plurality opinion recognized that the men were engaged in a symbolic form of expression, even though they did not speak, and that such expression is protected under the first amendment.<sup>80</sup> A key factor for dismissal of the conviction was that while the library had never been a public forum by custom, as had the streets in *Hague*, or by government action in opening the building for expressive activity, Brown had delivered his message by doing what one normally does in a library. He sat there silently.<sup>81</sup> Because the demonstration caused no disruption to the use of the library,<sup>82</sup> regulation barring such expressive activity, here by the use of a

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74. 393 U.S. 503 (1969).

75. *Id.* at 508.

76. *Id.* at 513.

77. The Court held that "[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509.

78. 383 U.S. 131 (1966).

79. *Id.* at 139.

80. *Id.* at 141-42. See *United States v. O'Brien* 391 U.S. 367 (1968); see also *Spence v. Washington*, 418 U.S. 405 (1974), where the Court found an act to be symbolic speech because "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id.* at 410-11.

81. Justice White observed that "the behavior of these petitioners and their use of the library building, even though it was for the purposes of a demonstration, did not depart significantly from what normal library use would contemplate." *Brown*, 383 U.S. at 151 (White, J., concurring).

82. *Id.* at 140. The sheriff who arrested the five men came to the library "when he saw

breach-of-the-peace statute, was held unconstitutional.<sup>83</sup> Thus, the Court demonstrated that the key issue is whether the government regulation in dispute sufficiently preserves the use to which the property was dedicated.

### C. Sites Designed For Expression

While the places at issue in *Brown*, *Tinker*, and other cases discussed above were principally designed for other purposes,<sup>84</sup> some government property has by designation been opened specifically for expressive purposes. The Minnesota State fairgrounds at issue in *Heffron v. International Society for Krishna Consciousness, Inc.*<sup>85</sup> are an example of such property. Like any other fairgrounds, they are specifically designed for expressive purposes.<sup>86</sup> Members of the International Society for Krishna Consciousness (ISKCON) sought to engage in Sankirtan, the Krishna religious practice of selling religious literature and soliciting contributions, by roaming freely over the fairgrounds, but the ordinances governing the use of the fairgrounds required that all selling or distribution of literature be conducted from pre-assigned, rented booths.<sup>87</sup>

In evaluating this restriction on expression, the Court examined the peculiar necessities imposed by the nature of the fairgrounds.<sup>88</sup> The booth regulations here were found to sufficiently further the government's interest in the orderly movement and control of the large number of people attending the fair to justify the restriction on expression which they imposed.<sup>89</sup> In making this evaluation, the Court did not focus only on the extent to which selling literature and soliciting funds by the few members of ISKCON would affect the movement of the crowds at the fairgrounds. Instead, it recognized that invalidating the restriction would allow any and all groups wishing to express a religious, political, or charitable message by selling literature or

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'these 5 colored males coming down the street,' " who then entered the library. Neither of the librarians had called him. *Id.* at 137.

83. *Id.* at 142. *Cf. Wright v. Georgia*, 373 U.S. 284 (1963) (six young men arrested and convicted of a breach of the peace for playing basketball in a public park in Savannah, Georgia; the Court found the convictions violated the due process clause of the fourteenth amendment). *Cf. Garner v. Louisiana* 368 U.S. 157 (1961) (students arrested and convicted of a breach of the peace for sitting at various lunch counters in Baton Rouge, Louisiana).

84. *See Brown*, 383 U.S. 131 (reading in a library not disrupted by silent demonstration); *Tinker*, 393 U.S. 503 (teaching in a school not disrupted by students wearing armbands); *Cox v. New Hampshire*, 312 U.S. 569 (travelling on the streets disrupted by marchers).

85. 452 U.S. 640 (1981).

86. The fairgrounds are "designed to exhibit to the public an enormous variety of goods, services, entertainment, and other matters of interest." *Id.* at 650.

87. *Id.* at 643-44.

88. *Id.* at 650-51.

89. *Id.*

soliciting funds to do so anywhere on the premises, causing widespread disorder.<sup>90</sup> Thus, restrictions that might not be valid on the streets or in similar areas would be valid at fairgrounds, due to the particular characteristics of the place.<sup>91</sup>

The two municipal theaters at issue in *Southeastern Promotions, Ltd. v. Conrad*<sup>92</sup> were certainly places designed to accommodate expression.<sup>93</sup> However, the officials in control of the theaters refused to permit use of the theaters for a production of the musical "Hair," largely because they felt the theaters should be used for "those productions which are clean and healthful and culturally uplifting, or words to that effect."<sup>94</sup> The Supreme Court held that the theater officials had engaged in an unlawful prior restraint in rejecting Southeastern's application for use of the theaters.<sup>95</sup> The Court found no legitimate basis related to the nature of the theaters to support the restriction<sup>96</sup> but concluded that the restriction was based on content alone.<sup>97</sup>

In *Healy v. James*,<sup>98</sup> students who wished to form a chapter of Students for a Democratic Society (SDS) were denied official recognition by the president of Central Connecticut State College. That denial barred them from

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90. *Id.* at 653. *Cf.* *Clark v. Community for Creative Non-violence*, 104 S. Ct. at 3071 (discussed *supra* note 52) (the Court held "that the validity of this regulation need not be judged solely by reference to the demonstration at hand," and looked at the effect of opening Lafayette Park for sleeping to groups other than CCNV).

91. *Heffron*, 452 U.S. at 651.

92. 420 U.S. 546 (1975).

93. *Id.* at 555.

94. *Id.* at 549. The Federal District Court agreed, finding the show obscene. *Southeastern Promotions, Ltd. v. Conrad*, 341 F. Supp. 465 (E.D. Tenn. 1972), *aff'd* 486 F.2d 894 (6th Cir. 1973).

95. *Southeastern Promotions*, 420 U.S. at 552.

96. *Id.* at 555-56. *See, e.g.,* *Cinevision Corp. v. City of Burbank*, 745 F.2d 560 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2115 (1985), where the Court of Appeals disallowed the city's ban of "hard rock" musical groups from the Starlight Bowl, as the ban was made without reference to the degree to which those groups' audiences had caused disturbances. The city had not allowed concerts by Blue Oyster Cult, Al Stewart, and Roxy Music as well as Todd Rundgren (because he would attract homosexual crowds, 745 F.2d at 576), Patti Smith (because she said "off-the-wall things," *id.* at 577), and Jackson Browne (because he would attract crowds opposed to nuclear power. *Id.*). One City Councilman had stated in a letter to a local clergyman that "having concerts at the Starlight Bowl . . . will bring to Burbank the dopers and sexual misfits of Los Angeles into direct contact with the youths of Burbank . . . . I hope you will also ask your fellow ministers, priests and rabbis to join with you in this morality fight." *Id.* at 576 n.20. The court found that "[e]xcluding a performer because of his political views, or those of the crowd that he might attract, or because the performer might say unorthodox things, as well as considering such arbitrary factors as the lifestyles or race of the crowd that a performer would attract, is not constitutionally permissible." *Id.* at 577.

97. *Southeastern Promotions*, 420 U.S. at 555-56. The Court held further that the finding that the content was obscene, and therefore illegal, prior to the actual staging of the show was not made "under a system with appropriate and necessary procedural safeguards." *Id.* at 559.

98. 408 U.S. 169 (1972).

placing notices in the student newspaper; prohibited their use of campus bulletin boards; and denied them access to university facilities for meetings.<sup>99</sup> The reasons for the denial included the group's affiliation with the National SDS and objection to the group's philosophy. Other reasons articulated by the university were the fear that the group would cause disruption on the campus and the lack of assurances that the group would abide by university policies.<sup>100</sup> The Supreme Court concluded that restricting the students expression through denial of recognition<sup>101</sup> could not be justified for any of the first three reasons<sup>102</sup> and remanded the case to determine if there was any factual basis for the fourth, the alleged lack of assurances of conformity to university policy.

Recognizing that the university need not allow interference with the educational process, the Court found that the group could be excluded only if there was substantial evidence that it would disrupt the campus.<sup>103</sup> But there was no such evidence, and the university appeared to have excluded the group merely because it was afraid, in a general sense, that the group might be disruptive.<sup>104</sup> The Court held, however, that the requirement that groups promise, before recognition, to abide by university regulations was a reasonable time, place, and manner regulation.<sup>105</sup> In remanding the case for further consideration of whether the SDS had abided by such a requirement,<sup>106</sup> the Court allowed no greater restriction on speech than would be necessary to preserve the normal functioning of the forum, the academic community.

Another student group challenged its exclusion from campus facilities in *Widmar v. Vincent*.<sup>107</sup> There, members of Cornerstone, a registered student group, were denied the use of facilities at the University of Missouri at Kansas City because they were a religious organization. The Supreme Court

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99. *Id.* at 175-76. The students were removed from the "Devil's Den," a coffeeshop in the Student Center, while attempting to meet to determine what to do about the rejection of recognition. *Id.* at 176 & n.6.

100. *Id.* at 185-94.

101. The court found that "the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." *Id.* at 181-82.

102. *Id.* at 185.

103. *Id.* at 189.

104. The Court found the exclusion to be based on "little more than the sort of 'undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.'" *Id.* at 191, (quoting *Tinker*, 393 U.S. at 508).

105. *Healy*, 408 U.S. at 192-93.

106. *Id.* at 194.

107. 454 U.S. 263 (1981).

found that in regularly opening its facilities for use by student groups, the university had created a public forum for expression, from which exclusions could be made only in accord with constitutional limitations.<sup>108</sup> The Court recognized that a university may have legitimate reasons for excluding some groups who could not be excluded from other fora<sup>109</sup> but found this exclusion, based solely on the content of the group's speech, to be unconstitutional.<sup>110</sup> In order to justify such an exclusion, the university would have to show that it was carefully drafted in order to restrict speech no more than was required to further a compelling state interest.<sup>111</sup> The restriction was found not to be necessary in serving the state's interest in not promoting religion, because providing the forum would not be a sign of state approval of a particular religious sect.<sup>112</sup> Further, because the forum would be open to a wide range of groups, both religious and secular, opening the forum would not have the primary effect of advancing religion.<sup>113</sup>

#### D. Inappropriate Sites For Expression

There are, of course, some government facilities that have not been opened by the government for expressive purposes and which, because of their nature, are not appropriate for some forms of expression. In *Adderley v. Florida*,<sup>114</sup> the Court rejected the assumption that expression was constitutionally protected regardless of its time, place, or manner.<sup>115</sup> The property at issue in *Adderley* was the grounds of a county jail, where a group of demonstrators had gathered to protest the arrest of some of their compatriots. In so doing, the protestors had blocked the jail driveway and entrance, which were restricted to official use.<sup>116</sup> The demonstrators' trespass conviction

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108. *Id.* at 267.

109. The Court observed:

A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations *compatible with that mission* upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.

*Id.* at 267 n.5 (emphasis added).

110. *Id.* at 276.

111. *Id.* at 269-70.

112. *Id.* at 273-74.

113. *Id.* at 274-75.

114. 385 U.S. 39 (1966).

115. *Id.* at 47-48.

116. The Court found that "[t]his particular jail entrance and driveway were not normally used by the public, but by the sheriff's department for transporting prisoners to and from the courts several blocks away and by commercial concerns for servicing the jail." *Id.* at 45.



tions were upheld because there was no evidence that the arrests were based on the content of the demonstrators' speech, but rather were made to prevent interference with the functioning of the jail.<sup>117</sup>

Although a major basis of the decision in *Adderley* was that the jail grounds had never been generally open to the public,<sup>118</sup> the converse proposition, that property which is generally open to the public is an appropriate forum for expression, is not necessarily true. In *Greer v. Spock*,<sup>119</sup> regulations strictly prohibiting some forms of expression<sup>120</sup> within the Fort Dix Military Reservation were upheld, despite the fact that unrestricted areas of the base were open to civilians.<sup>121</sup> Presidential and vice-presidential candidates of the People's Party and of the Socialist Workers Party had challenged those restrictions, which prevented them from campaigning on the post. The Court, however, observed that training, not expression, was the purpose of bases like Fort Dix<sup>122</sup> in holding that a commander could constitutionally act to preserve loyalty, discipline, and morale by restricting expression on the base.<sup>123</sup>

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117. *Id.* at 47. The Court declared that "[t]he United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." *Id.* at 48.

118. The Court found "no evidence at all that on any other occasion had similarly large groups of the public been permitted to gather on this portion of the jail grounds for any purpose." *Id.*

119. 424 U.S. 828 (1976).

120. *Id.* at 831 & n.2.

121. *Id.* at 830. The Court noted that "a sign at one of the entrances says 'Visitors Welcome.'" *Id.* See *id.* at 871-72 (Brennan, J., dissenting) (photographic appendix).

122. *Id.* at 838.

123. *Id.* at 840. The Court held that "[t]here is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command." *Id.*

In upholding Fort Dix's policy of excluding political campaigning the Court distinguished *Flower v. United States*, 407 U.S. 197 (1972), where the Court had overturned the conviction of an individual who had been arrested for distributing leaflets on an open street inside a military base. There, the Court had held that because that particular street was completely open to civilian traffic, "[u]nder such circumstances the military has abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue." *Id.* at 198. The candidates in *Greer* could be prohibited from the same act, in similar circumstances, because the authorities at Fort Dix had not abandoned such claim of special interest in expression on that base. *Greer*, 424 U.S. at 837.

The Court found further that although speakers whom the authorities had decided "would be supportive of the military mission of Fort Dix," had been invited onto the base, that fact did not create a public forum and "leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever." *Id.* at 838 n.10.

Similarly, in *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977), the Court allowed prison officials to restrict bulk mailing and meetings by prisoners who wished to form a union, although both the Jaycees and Alcoholics Anonymous had been allowed such privileges. The Court held that the prison officials "need only demonstrate a rational basis for their

A consistent policy of exclusion was a major basis for the Court's decision in *Lehman v. City of Shaker Heights*,<sup>124</sup> where the Court upheld a city's ban on political advertising on car cards in its public transit system. The total exclusion of all political advertising<sup>125</sup> supported the Court's finding that rather than creating a public forum, the city was engaging in commerce by providing transportation for its residents.<sup>126</sup> The restriction on political advertising was merely incidental to that effort.<sup>127</sup> A second justification for the city's restrictions on the advertising that it accepted for the public transit system was the protection of the sensibilities of its users, who, as a captive audience, would have little choice but to be subjected to the advertisements.<sup>128</sup> Thus, the Court allowed the city to preserve the transit system for its intended purpose, and not for the expression of political opinion.<sup>129</sup>

Expressions of political opinion are found in mailboxes all the time.<sup>130</sup> Federal law, however, limits access to the boxes to material on which postage has been paid.<sup>131</sup> In *U.S. Postal Service v. Council of Greenburgh Civic Associations*,<sup>132</sup> local civic groups challenged this restriction on their ability to distribute messages and pamphlets. The Court rejected this challenge and

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distinctions between organizational groups." *Id.* at 134. The Court accepted the prison officials basis for distinguishing the union from the Jaycees and AA, *id.* at 134 n.10, finding that both groups, but not the union, "were seen as serving a rehabilitative purpose, working in harmony with the goals and desires of the prison administrators, and both had been determined not to pose any threat to the order or security of the institution." *Id.* at 134.

124. 418 U.S. 298 (1974).

125. The Court found "uncontradicted testimony at the trial that during the 26 years of public operation, the Shaker Heights system, pursuant to city council action, had not accepted or permitted any political or public issue advertising on its vehicles." *Id.* at 300-01.

126. *Id.* at 303.

127. *Id.* The Court explained that the restriction could be justified because:

Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians.

*Id.* at 304.

128. *Id.* at 307 (Douglas, J., concurring). *But see* *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 530 (1980). There the Court found that Edison customers receiving a message with their bill could "escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket." *Id.* at 542. *Cf.* *Cohen v. California*, 403 U.S. 15 (1971) (passersby could avoid allegedly offensive words by averting their eyes).

129. The Court explained that "[w]ere we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." *Lehman*, 418 U.S. at 304.

130. *See* L. SABATO, *THE RISE OF POLITICAL CONSULTANTS: NEW WAYS OF WINNING ELECTIONS* 220-63 (1981).

131. 18 U.S.C. § 1725 (1969) (current version at 18 U.S.C. § 1725 (1982 & Supp. I 1983)).

132. 453 U.S. 114 (1981).

found that the restriction protected Postal Service revenues, prevented overcrowding of the boxes, promoted the privacy of the mails, and aided in the investigation of mail theft.<sup>133</sup> These restrictions were all part of an effort to preserve the boxes for their intended purpose and to ensure efficient delivery of the mail. Thus, while a person may use the mails for delivery of almost any message he wishes, the Post Office may still limit access to the system to those messages bearing the proper postage.<sup>134</sup>

Access to a school district's internal mail system was sought in *Perry Education Association v. Perry Local Educators' Association*.<sup>135</sup> The system was used primarily to send messages to and among the teachers,<sup>136</sup> but the system had also been used by private organizations not directly connected to the school, such as the YMCA and Cub Scouts.<sup>137</sup> Access also was provided to the union that exclusively represented the teachers, but not to rival unions.<sup>138</sup> A rival union, which had previously been allowed access to the system, challenged this restriction, claiming that the system constituted a limited public forum from which it could not be excluded. After explaining the characteristics of various types of fora,<sup>139</sup> the Court found that the school mail system was not a limited public forum, as it was not open to the general public.<sup>140</sup> The Court held further that even if the mail system had become a limited public forum, access could still be limited to groups which were similar.<sup>141</sup> The facilities might be open to groups like those that had previously been allowed access, but not to a group like the rival union.<sup>142</sup> Although the rival union had previously been allowed access, that access was allowed because at the time it used the system in its capacity of representing the teachers.<sup>143</sup> The union's status had changed, however, when the other union became the exclusive representative of the teachers. This change in status justified its exclusion, as the representative union would now have

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133. *Id.* at 117-18.

134. The Court found that "it is a giant leap from the traditional 'soapbox' to the letterbox designated as an authorized depository of the United States mails, and we do not believe the First Amendment requires us to make that leap." *Id.* at 131.

135. 460 U.S. 37 (1983).

136. *Id.* at 39.

137. *Id.* at 39 & n.2.

138. *Id.* at 40.

139. See *supra* notes 16-29 and accompanying text.

140. 460 U.S. at 46-47.

141. *Id.* at 48.

142. *Id.* The facilities might be open to "the Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students, [but] they would not as a consequence be open to an organization such as PLEA [the rival union], which is concerned with the terms and conditions of teacher employment." *Id.*

143. *Id.*

exclusive responsibility for representing the interests of the teachers.<sup>144</sup> The Court reiterated that use of a property may be restricted to its official business.<sup>145</sup>

Each of the cases discussed above demonstrates the principle that regardless of the category of forum involved, the only legitimate concern the government may advance as justification for restrictions on expression in that forum is to preserve that particular property for its normal use.<sup>146</sup> Previous government action regarding expression may be helpful in determining the normal use of the property,<sup>147</sup> but it is not conclusive. Neither the library in *Brown* nor the jail grounds in *Adderley* had ever been opened by the government for expressive purposes. Still, expression was allowed in one place but not in the other, not because the government had condoned it there but because the expression was compatible with the place. To evaluate the scope of permissible expression in a place by the government's degree of acquiescence to that expression, rather than by the necessities imposed by the particular characteristics of the place, is to assume that first amendment rights are bestowed not by the Constitution but by the government. While the Supreme Court's 1897 decision in *Davis v. Massachusetts*<sup>148</sup> might support such an assumption, the Court's application of forum analysis over the intervening ninety years most certainly does not. In *Cornelius v. NAACP Legal Defense & Education Fund*,<sup>149</sup> however, the Court departed from the manner in

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144. *Id.* at 51-52. The exclusion was also justified as "a means of insuring [sic] labor peace within the schools." *Id.* at 52 & n.12.

145. The Court explained that "[a]s we have already stressed, when government property is not dedicated to open communication the government may—without further justification—restrict use to those who participate in the forum's official business." *Id.* at 53 & n.13.

146. The Court expressed this principle in *Hague*, 307 U.S. at 496, (discussed *supra* notes 36-40 and accompanying text) when it held:

The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

*Id.* at 515-16.

147. For example, in *Widmar*, 454 U.S. at 267 (discussed *supra* notes 107-13 and accompanying text), the Court recognized that the university had opened its facilities for student groups in order to further education. In *Lehman*, 418 U.S. at 303 (discussed *supra* notes 124-29 and accompanying text), the total exclusion of all political advertising supported the finding that the car cards were part of a commercial venture, rather than a political forum. In *Perry*, 460 U.S. at 48 (discussed *supra* notes 135-45 and accompanying text), opening the school mail system only to those private groups that provided educational activities to students supported the contention that use of the system was limited to official business.

148. 167 U.S. at 47 (discussed *supra* notes 33-35 and accompanying text).

149. 105 S. Ct. at 3439.

which it had applied forum analysis, suggesting the renewed validity of the principles expressed in *Davis*.

## II. APPLICATION OF FORUM ANALYSIS TO THE COMBINED FEDERAL CAMPAIGN

The forum at issue in *Cornelius* was the Combined Federal Campaign. The CFC is a fund-raising drive conducted each year among federal workers. Workers may make undesignated contributions to the fund which are then divided among participating organizations, or they may designate that their contributions go specifically to one or more of the participating organizations.<sup>150</sup> Funds are solicited through an informational leaflet distributed to federal workers, in which each participating organization may place a thirty-word statement describing its activities.<sup>151</sup> In the first of three cases involving the legal defense funds' (LDFs) participation in the campaign, *NAACP Legal Defense & Education Fund v. Campbell*,<sup>152</sup> the district court found that the CFC was a government-sponsored means of communicating with federal workers.<sup>153</sup>

In that case, the district court found the then applicable "direct services" requirement on participation in the CFC to be too vague to justify exclusion of the LDFs and thus unconstitutional.<sup>154</sup> Following that case, Donald Devine, Director of the Office of Personnel Management, the agency responsi-

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150. See *NAACP Legal Defense & Educ. Fund v. Devine*, 727 F.2d 1247, 1249-50 (D.C. Cir. 1984).

151. *Id.* at 1250.

152. 504 F. Supp. 1365 (D.D.C. 1981).

153. The district court held that "by providing organizations the opportunity to participate in the CFC, the government has, in effect, provided a billboard or channel of communication through which organizations can disseminate their appeals to federal workers." *Id.* at 1367.

154. *Id.* at 1368. The government had asserted that the LDFs did not provide "direct services to persons in the fields of health and welfare services," as required by the CFC regulations, "but rather serve as advocates for groups." *Id.* at 1366. However, the court noted:

Plaintiffs argue at length that they do provide "direct services" in a variety of ways. The record is replete with the results of plaintiffs' work, indicating that law suits by plaintiffs have provided millions of dollars in back pay and benefits, and invaluable other "services" such as increased training opportunities, additional promotions, improved school programs, and better hospital facilities. Apart from their litigation activities, each plaintiff also provides "direct services" through scholarship programs and education efforts. Given defendant's failure adequately to define the "direct services" requirement, it is impossible for plaintiffs to know how to conform their activities to meet that requirement short of becoming a public defender or legal aid society.

*Id.* at 1368.

In a second case, *NAACP Legal Defense & Educ. Fund v. Devine*, (*NAACP II*), 560 F. Supp. 667 (D.D.C. 1983), the LDF's challenge to the guidelines by which undesignated CFC revenues were distributed was rejected.

ble for administering the CFC, sought to amend the regulations in order to exclude the LDFs.<sup>155</sup> The result of his efforts was an executive order which further defined "direct services" and which ordered that advocacy groups be excluded.<sup>156</sup> Because those new guidelines would exclude them from the campaign, the LDFs brought a challenge to their enforcement that eventually reached the Supreme Court in *Cornelius*.

On motion for summary judgement, the district court ruled that the government could not deny the LDFs access to the campaign for the solicitation of designated payments.<sup>157</sup> The court found that solicitation of funds is speech protected by the first amendment<sup>158</sup> and that organizations participating in the campaign were appealing to federal workers for support.<sup>159</sup> However, that persuasive effort, conducted entirely through a thirty-word statement in the campaign leaflet, was found only to apply to solicitation of designated contributions.<sup>160</sup> Undesignated contributions were found not to be made in response to any particular plea. Rather, an employee who makes such a contribution is simply giving to charity in general.<sup>161</sup> Finding that the CFC was a public forum in its limited context,<sup>162</sup> the court rejected the government's reasons for exclusion.<sup>163</sup>

The court of appeals affirmed the district court's decision regarding the solicitation of designated contributions.<sup>164</sup> The court did not decide what sort of forum the CFC constituted, finding that even if it was the sort of nonpublic forum found in *Perry*, the government's reasons for distinguishing LDFs from other groups were not reasonable.<sup>165</sup>

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155. See NAACP Legal Defense & Educ. Fund v. Devine, 727 F.2d at 1251-53.

156. The order decreed that "[a]gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves shall not be deemed . . . eligible to participate . . . ." Exec. Order No. 12,404, 3 C.F.R. 151 (1984). See NAACP v. Button, 371 U.S. 415 (1963). There, the Court found restrictions imposed by Virginia on the NAACP's solicitation of potential civil rights litigants to be unconstitutional. The Court noted: "In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state, and local, for the members of the Negro community in this country. *Id.* at 429.

157. NAACP Legal Defense & Educ. Fund v. Devine, (*NAACP III*), 567 F. Supp. 401 (D.D.C. 1983).

158. *Id.* at 406. See *Schaumburg*, 444 U.S. at 620.

159. *NAACP III*, 567 F. Supp. at 406.

160. *Id.*

161. *Id.* See *NAACP II*, 560 F. Supp. at 675.

162. *NAACP III*, 567 F. Supp. at 406.

163. *Id.* at 409.

164. NAACP Legal Defense & Educ. Fund v. Devine, 727 F.2d at 1247. The district court's dismissal of the LDFs' claim regarding undesignated funds was not appealed. *Id.* at 1254.

165. The court found that the government's assertion that the "exclusion of LDFs is a

On writ of certiorari, the Supreme Court reversed. Writing for the Court, Justice O'Connor found that solicitation of funds is protected by the first amendment.<sup>166</sup> She then defined the forum at issue to be the CFC and its literature, rather than the federal workplace, because the LDFs had sought access only to the CFC, not to the federal workplace as a whole.<sup>167</sup> Still, the character of the federal workplace remained a factor in the analysis.<sup>168</sup>

The Court then determined whether the relevant forum was public or nonpublic in nature.<sup>169</sup> The Court held that a public forum came into existence in one of only two ways: traditional use, as in *Hague*,<sup>170</sup> or through government creation.<sup>171</sup> Finding that the government only creates a public forum when it intends to do so,<sup>172</sup> the Court examined ways to determine the government's intent.<sup>173</sup> Using the government's intent as its basis for evaluation, the Court found that the CFC was a nonpublic forum, as its purpose was to limit expressive activities in order to prevent disruption.<sup>174</sup> The Court supported its finding that the CFC was a nonpublic forum by recognizing the government's power to limit access to the federal

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critical means of restricting participation in the CFC to 'those charities which assist those who are most in need,' " to be "*patently ludicrous* in view of the wide range of organizations included in the CFC," including the United States Olympic Committee, and many others. *Id.* at 1259 (emphasis added).

The court found further that the LDFs better served the purpose of the CFC, as asserted by the government, than many groups which would remain, because through the LDFs' litigation efforts, "hundreds of thousands of persons have received direct benefits, such as income supplementation in the form of back pay and future earning, better educations, improved health care, better housing and other living conditions, humane conditions of incarceration and, in the case of [its] capital punishment program, life itself." *Id.* at 1260 (quoting Affidavit of Jack Greenberg, Director-Counsel of the NAACP, at 6 (Nov. 25, 1980).

166. *Cornelius*, 105 S. Ct. at 3447. See *supra* note 9.

167. *Id.* at 3448-49.

168. *Id.* at 3449.

169. *Id.* at 3449-51.

170. 307 U.S. 496 (1939).

171. *Cornelius*, 105 S. Ct. at 3449.

172. The Court found that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." *Id.* *Contra* *Flowers v. United States*, 407 U.S. 197 (1972) (where the Court found that the commander of a military base had "abandoned any claim [of] special interest in who walks, talks, or distributes leaflets on the avenue").

173. The Court said it "has looked to the policy and practice of the government to ascertain whether [the government] *intended* to designate a place not traditionally open to assembly and debate as a public forum," and that it "has also examined the nature of the property and its compatibility with expressive activity to discern the governments *intent*." 105 S. Ct. at 3449 (emphasis added).

174. The Court found that "[t]he historical background indicates that the Campaign was designed to minimize the disruption to the workplace that had resulted from unlimited ad hoc solicitation activities by *lessening* the amount of expressive activity occurring on federal property." *Id.* at 3451 (emphasis in original).

workplace.<sup>175</sup>

Having defined the CFC as a nonpublic forum, the Court defined the parameters of government restrictions on speech in that type of forum. Reiterating the teaching of *Perry*,<sup>176</sup> the Court held that speaker and subject matter distinctions are permissible in a nonpublic forum, as long as those distinctions are justified by the nature of the forum and are viewpoint neutral.<sup>177</sup> The Court then held that because it is a nonpublic forum, judicial evaluations of those justifications need not be as exacting as in other types of fora.<sup>178</sup>

The government managed to overcome these constitutional obstacles, as the Court accepted its justifications for excluding the LDFs': the President could find that direct aid, rather than litigation, best served charitable goals;<sup>179</sup> the government could reasonably wish to avoid the appearance of

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175. *Id.* The Court had earlier defined the forum at issue as the CFC, not the federal workplace. *Id.* at 3448-49.

176. *See supra* notes 135-45 and accompanying text.

177. *Cornelius*, 105 S. Ct. at 3451.

178. The Court held:

The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated. . . . Nor is there a requirement that the restriction be narrowly tailored or that the Government's interest be compelling.

*Id.* at 3453 (emphasis in original).

179. The Court observed that "[h]ere the President could reasonably conclude that a dollar directly spent on providing food or shelter to the needy is more beneficial than a dollar spent on litigation that might or might not result in aid to the needy." *Id.* But see *id.* at 3463 n.5 (Blackmun, J., dissenting) where he notes:

During the 1981-1982 Campaign year, groups allowed to participate in the CFC for the National Capital Area included Close-up, "An alternative means of political education structured to teach high school students about government while providing opportunities for involvement to aid in deciding political futures;" The Rep, Incorporated, which "Provides a forum for training and educating writers, actors, theatrical directors and other theater craftsmen;" African Heritage Dancers and Drummers, "A community arts organization designed to give students and area residents a greater appreciation of traditional African arts, dance and music;" D.C. Striders, "An organization of promising high school athletes which provides structured programs for field and track competitors;" the District of Columbia Music Center, which "Provides the opportunity for understanding and appreciation of the Fine Arts through study and performance;" and the Howard Theater Foundation, which "Preserves the cultural legacy of the Howard Theater." Those groups may well provide most worthwhile services, but their inclusion in the CFC is difficult to square with the Government's purported conclusion that charitable contributions are best spent providing food or shelter to the needy. [The Government] would explain all these inconsistencies by saying that at times it may have misapplied its own eligibility criteria. . . . If the Government is truly concerned that money be spent di-



political favoritism;<sup>180</sup> the government could wish to avoid controversy which might disrupt the federal workplace;<sup>181</sup> and the government could reasonably wish to exclude organizations whose presence might endanger the success of the campaign.<sup>182</sup> The Court, however, did find reason to suspect that bias may have affected the decision to exclude the LDFs<sup>183</sup> and allowed the LDFs to pursue, on remand, the allegation that the Reagan administration had excluded them from the CFC because the administration disagreed with their viewpoints.<sup>184</sup>

In dissent, Justice Blackmun complained that the Court had failed to properly evaluate the relationship between the forum and the type of expression in question. In his view, the proper approach would be to balance the conflicting interests before labelling the property at issue as a particular type of forum, as that labelling could be conclusive of the question when, as in *Cornelius*, it dictates the sort of analysis that will then be undertaken.<sup>185</sup> Additionally, he complained that previous restrictions should not determine the permissibility of expression in a particular forum, but that compatibility of expression with the intended use of the property should be examined inde-

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rectly on food and shelter for the needy, it is strange that it could have misapplied its criteria almost 75% of the time.

180. *Id.* at 3453. See *NAACP Legal Defense & Educ. Fund v. Devine*, 727 F.2d at 1262 (quoting *Planned Parenthood Federation of America v. Devine*, No. 83-2118 (D.D.C. Sept. 14, 1983)): "Everyone knows where I [Director Devine] stand in regard to the kind of practices that Planned Parenthood does. You promote abortions; I think that's detestable (sic). I think in a just world you'd have nothing to do with a charitable drive." Contrary to Director Devine's wishes, Planned Parenthood was included. *Id.* at 3-4. See also 727 F.2d at 1264, where the Court of Appeals noted that "participation by the Moral Majority Foundation, Inc., was allowed even though its activities include providing educational services with respect to abortion counseling. One can hardly envision decisions more likely to lead to outcries of 'politicization' . . . ." *Id.*

181. *Cornelius*, 105 S. Ct. at 3453. But see *id.* at 3467 n.4 (Stevens, J., dissenting) ("Expressions of affection for the Dallas Cowboys would surely be forbidden in all federal offices located in the District of Columbia if the avoidance-of-controversy rationale were valid.").

182. *Id.* at 3453-54. This rationale is undermined by the LDFs' assertion that "the alleged controversy has had no discernible impact upon the success of the Campaign. Contributions have increased every year that legal defense funds have participated . . . ." Brief for Respondents at 34-35 & n.44, *Cornelius v. NAACP Legal Defense & Educ. Fund*, 105 S. Ct. 3439 (1985).

183. 105 S. Ct. at 3454-55.

184. *Id.*

185. Justice Blackmun complained that "[r]ather than taking the nature of the property into account in balancing the first amendment interests of the speaker and society's interests in freedom of speech against the interests served by reserving the property to its normal use, the Court simply labels the property and dispenses with the balancing." *Id.* at 3459 (Blackmun, J., dissenting).

pendently.<sup>186</sup> In a separate dissenting opinion, Justice Stevens questioned the value of forum analysis, as applied here, to the decisional process.<sup>187</sup> He would have found that because the LDFs sought only to receive designated contributions, which reflect the choice of the individual donor, none of the government's justifications for exclusion were valid.<sup>188</sup>

The Court's opinion in *Cornelius* departs from its earlier decisions.<sup>189</sup> In those cases, the Court made a straight-forward evaluation of the way in which a particular manner of expression would affect a particular forum.<sup>190</sup> Certain restrictions on speech or distinctions between speakers were allowed because the nature of the forum dictated that they be allowed.<sup>191</sup> In these earlier cases the Court often described the disputed site of expression as one of the three types of fora to demonstrate its similarity to other sites where the Court's evaluation had reached a similar result.<sup>192</sup> In *Cornelius*, however, the Court has placed the site in a category and allowed that artificially imposed designation to dictate its standard of scrutiny. With its intensity of examination thus relaxed, the Court accepted justifications for restrictions which it otherwise would have rejected.<sup>193</sup>

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186. Justice Blackmun asserted that "[t]he guarantees of the first amendment should not turn entirely on either an accident of history or the grace of the Government." *Id.* at 3460.

187. *Id.* at 3466 (Stevens, J., dissenting).

188. *Id.* at 3466-67.

189. See, e.g., *Tinker*, 393 U.S. at 503 (discussed *supra* notes 74-77 and accompanying text); *Widmar*, 454 U.S. at 263 (discussed *supra* notes 107-13 and accompanying text); *Chicago Police Dep't*, 408 U.S. at 92 (discussed *supra* notes 68-70 and accompanying text).

190. See, e.g., *Heffron*, 452 U.S. at 640 (discussed *supra* notes 85-91 and accompanying text); *Greer*, 424 U.S. at 828 (discussed *supra* notes 119-23 and accompanying text).

191. See *supra* note 190.

192. Justice Blackmun explained that "[t]hus, the public forum, limited public forum, and nonpublic forum categories are but analytical shorthand for the principles that have guided the Court's decisions regarding claims to access to public property for expressive activity." *Cornelius*, 105 S. Ct. at 3459 (Blackmun, J., dissenting).

193. The Court's acceptance of the President's preference for direct aid to the needy over aid through litigation as justification for exclusion of the LDFs is curious in light of the participation of various groups that do not provide such aid. See *supra* note 179. Further, the CFC is designed to reflect the preference of the individual donor by allowing him to designate his contribution for a specific group. See *Cornelius* 105 S. Ct. at 3466 (Stevens, J., dissenting).

Avoidance of the appearance of favoritism was rejected as a justification for exclusion of a group in *Widmar*, 454 U.S. at 274-75 (discussed *supra* notes 107-13 and accompanying text). There, the Court found that the wide variety of groups granted access precluded any inference of favoritism. *Id.*

In *Cornelius*, a 30-word request for contributions was found too controversial for the federal worker, while opposition to the Vietnam War was found *not* to be too controversial for high school students in *Tinker*, 393 U.S. at 503 (discussed *supra* notes 74-77 and accompanying text). In *Terminiello v. Chicago*, 337 U.S. 1, (1949), Justice Douglas took a dim view of controversy as a justification for silencing speakers. He declared:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates

Different standards of review are not without precedent.<sup>194</sup> But here, because the Court categorizes a place as a particular type of forum by reference to the restrictions on expression the government *intended* for that place, the Court allows the government to set its own standard of review. Thus, a circular pattern emerges. The government decides to restrict expression in a place. The Court, seeing that the government intended to restrict expression there, categorizes the place as a type of forum according to the degree of restriction the government intended. The type of forum then dictates the standard of review with the degree of scrutiny varying inversely with the degree of restriction. When the restriction is challenged, the Court, with an appropriately relaxed examination, accepts the government's justifications, thereby validating the restrictions. Thus, the government is permitted a restriction because the government intended that restriction.

This deference to the government's intent is inconsistent with the history of first amendment jurisprudence, which is, by its nature, made up of cases in which the government intended to restrict an individual's expression. In *Hague*, the government intended to keep the CIO out of Jersey City. In *Heffron*, the government intended to keep Hare Krishnas out of the broadways at the fairgrounds. In *Southeastern Promotions*, the government intended to keep "Hair" out of its theaters. In *Greenburgh*, the government intended to keep unstamped mail out of mailboxes. And in *Brown*, the government intended to keep black people out of the public library. The government's success or failure on review depended not on its intent, but on the degree to which its restrictions were justified by the nature of the forum. Under the analysis used in those and other cases, the government in *Cornelius* might not have succeeded in its attempt to keep the legal defense funds out of the Combined Federal Campaign.

### III. CONCLUSION

In *Cornelius v. NAACP Legal Defense & Education Fund*, the Supreme Court held that the government could constitutionally deny several legal de-

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dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

*Id.* at 4-5 (citations omitted).

194. See, e.g., *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

fense funds access to charitable solicitation through the Combined Federal Campaign. The Court found the government's justifications for exclusion to be reasonable in preserving the CFC for its designated purpose, nondisruptive solicitation of contributions in the federal workplace by groups the government described as traditional charities.

The major effect of *Cornelius* has been to transform the descriptive forum analysis dicta of *Perry* into a constitutional test. Labels which had previously been descriptive have become prescriptive, all but determining the result the Court will reach. Because these labels are applied largely on the basis of the Court's perception of the government's intent, that intent has become self-fulfilling. Motivation becomes justification, without regard to the constraints imposed by the first amendment. *Cornelius* implies that now the government may be permitted to control its property as would a private individual, who, unlike the government, had never owed a constitutional duty to respect the freedom of speech. Such an implication is disheartening to those who believe that the Constitution, not the government, should determine the rights to which an individual is entitled.

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